United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2499

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P/S

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For the Second Circuit

WINSTON E. KOCK, JR.,

Plaintiff-Appellee,

against

THE BRUNSWICK CORPORATION,

Defendant-Appellant.

Appeal from a Judgment of the United States District Court for the Southern District of New York

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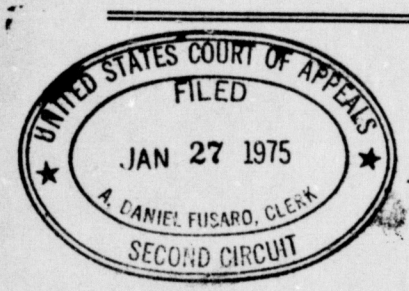
DEFENDANT-APPELLANT'S BRIEF



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Preliminary Statement

This is an appeal by defendant-appellant, The Brunswick Corporation ("Brunswick") from a judgment of the District Court for the Southern District of New York (Frankel, D.J.) in favor of plaintiff, Winston E. Kock, Jr. ("Kock"), in the amount of $79,464.78, after trial before a Court and jury.

Issues Presented for Review

1. In an action for Brunswick's breach of contract, where a substantial portion of the contract remained to be performed by Kock, and where the record does not contain an essential item of proof which is needed to sustain a verdict in Kock's favor, that is, proof of his ability to perform the balance of his contractual obligations, was it error for the Court below to rule that the record contained evidence sufficient to sustain a verdict in Kock's favor?

2. In the circumstances described above, did the Court below commit error in taking the issue of Kock's ability to perform the balance of his contractual obligations away from the jury and deciding it in Kock's favor?

3. Where there was a failure to present any competent evidence that Kock suffered damages as a result of Brunswick's alleged breach of contract, was it error for the Court below to submit the issue of damages to the jury?

4. Was it error for the Court below not to direct that Brunswick be credited with the amount of Kock's proceeds arising from the contract and, as a consequence, to permit Kock to recover a portion of his damages twice?

5. Were the instructions to the jury, relating to Brunswick's entitlement to a credit for Kock's proceeds, erroneous?

6. Was it error for the Court below to permit so much of the award to stand, as represented a double reimbursement to Kock?

Statement of Facts

On November 27, 1972, Kock and Brunswick entered into the agreement which is the subject of this action (458-61A).* At the time of the making of the agreement, Brunswick was the owner and operator of a large number of bowling establishments. Under the terms of the agreement, Kock undertook to supply Brunswick with a substantial quantity of score sheets which were to be used by Brunswick in its business in the United States (458-61A). Kock had no prior experience in the bowling industry, his sole business experience having consisted of several years' employment in the television industry (37-38A, 226-27A).

Prior to the making of the agreement with Kock, Brunswick's score sheets were supplied by Walt Peabody Advertising, Inc. ("Peabody"), pursuant to an oral contractual arrangement which dated back several years (351 SM). Customarily, and as was the case with Peabody, a score sheet supplier furnishes score sheets to a bowling center without charge, deriving his revenue from the sale of advertising which appears on the score sheets (351 SM). The Peabody organization consisted of a large, nationwide staff of salesmen who sold score sheet advertising to local businesses for use in bowling centers within the market area of the advertiser (352 SM). Under the arrangement with Peabody, each separate Brunswick establishment had its own score sheet containing the advertisements of local business proprietors. Peabody sold advertising on a

* References to "(—A)" are to the Joint Appendix. References to "(—SM)" are to the portions of the stenographer's minutes of the trial not included in the Appendix.

twelve-month basis and furnished score sheets to the individual bowling centers on a like basis. The inception of the twelve-month period varied from center to center, depending upon such factors as the date the advertising was sold, or the date upon which Brunswick first began operation of the center (351-52 SM).

Even though Peabody was generally a satisfactory supplier of score sheets, Brunswick decided it wanted to have well known, brand name advertisers upon its score sheets and requested Peabody to attempt to obtain national advertisers, as distinguished from local advertisers. Peabody was unable to do so (352 SM).

In January, 1972, William Kratzenberg, a Brunswick employee occupying the position of National Merchandising Manager, met with Kock and one, Al Tiede, who were the stockholders of a fledgling company known as Tiede Enterprises, Inc. (38A). At the meeting, Tiede stated that a program for national score sheet advertising was in the developmental stage and that he had numerous advertising prospects. Kratzenberg, Tiede and Kock discussed the problem which was to result in this lawsuit. Kratzenberg explained that over the years there had been built into the relationship with Peabody a variety of contract termination dates and that Brunswick was obligated, both to Peabody and to the local advertisers, who in many instances constituted Brunswick's customers, to honor those dates. Tiede stated that this would not present a problem, as it was his plan to sell score sheets to many bowling centers, including the Brunswick centers. In such circumstances, each Brunswick center could be added to the existing distribution as it became available (354 SM).

In June, 1972, Kock, having severed his relationship with Tiede, telephoned Kratzenberg and asked if Brunswick was still interested in the national advertising program. Kratzenberg answered affirmatively and, on June 8, 1972 at a meeting at Brunswick's offices in Skokie, Illinois, Kock presented Kratzenberg with a proposed contract, already signed by Kock, for the supply to Brunswick of all of its paper and plastic score sheet requirements for the period of one year. At this meeting, Kratzenberg and Kock discussed various problems and specifications, and particularly the problem created by the Peabody contracts. Kratzenberg stated that he did not know the various expiration dates of the Peabody contracts at the Brunswick centers. Kock recognized that the phasing-in of new score sheets represented a problem to Brunswick but was not able to present any solutions. As the parties left the June 8th meeting, Brunswick had manifested an interest in Kock's proposal; the specifics of the proposal were yet to be formulated; and the recognized problem as to phasing-in had not been resolved (43-49A, 357 SM).

In early August, Kratzenberg felt that it was time that Kock substantiated his ability to deliver the score sheets. He telephoned Kock and asked for substantiation that Kock was proceeding with development of a program. Kock responded with a vague commitment on his part to furnish score sheets to all centers beginning in March, 1973 (366 SM, 410 SM, 56A). At this time, a number of basic details had yet to be resolved, including the number of plastic score sheets to be supplied. Notwithstanding his "commitment," Kock did not have a single undertaking from any advertiser.

Two months later, on October 10th, Kratzenberg, not having had word from Kock as to his progress, wrote to him stating that he assumed that Kock had abandoned his work on the project (261A). This letter elicited a response from Kock similar to his August response, but this time accompanied by another written proposal dated October 12th, containing numerous modifications to the June 8th proposal (61A, 458-60A, 366-67SM). One such modification was a doubling of the quantity of plastic score sheets (65A). The proposal contained a space for Brunswick's acceptance in writing. Following the receipt of the October 12th proposal, Kratzenberg asked Kock to visit him in Skokie (62-63A, 367SM). At a meeting held on November 27, 1972, the contract upon which this action is based was entered into. Brunswick did not sign the Kock proposal but instead confirmed its intention to enter into an agreement substantially as set forth in the proposal. In its letter of confirmation it stated:

> "As we explained to you, Brunswick may have certain commitments to Walt Peabody Advertising Service. Brunswick intends to live up to any legally binding obligation to Peabody, but we will take every legally permissible step to phase them out at the earliest practicable time" (461A).

Brunswick placed all of its reliance on the terms of the November 27th letter. It was its position at trial that the provisions of the letter permeated the relationship, and that everything which transpired between the parties was governed by the provisions that Brunswick will "live up to any legally binding obligation to Peabody" and that it "will take every legally permissible step to phase them [Peabody] out at the earliest practicable time." It was

Kock's contention at trial that Brunswick had agreed to the simultaneous use, during March, 1973, of the score sheets furnished by him in all of its bowling centers.

As of November 27, 1972, Brunswick was still not aware of the diverse termination dates of the Peabody contracts, nor had it terminated the contract to use Peabody's score sheets in any of its centers (369SM, 372SM, 404SM). Kock was aware that the process of terminating Peabody and phasing-in his score sheets could not take place within the three-month period between November 27, 1972 and March 1, 1973 (247A). Brunswick endeavored to secure the availability of as many centers as possible in March, 1973, all in the absence of clear information as to the precise nature of its obligations to Peabody on a bowling center-by-center basis (373SM).

As of November 27, 1972, Kock had a firm commitment from one advertiser, that is an agency representing the United States Army, for score sheet advertising for six months beginning January 1, 1973 (455A). Kock testified that this commencement date was an error and that he was able to correct it verbally, to provide that the advertising would commence in March, 1973 (285-88A). During December, 1972 and January, 1973, Kock secured commitments from additional advertisers (463A, 465A, 467A, 469A).

Kock collected a total of $39,760 from his advertisers (180A, 405A). Once he had these proceeds, he was able to supplement his own limited funds and to enter into a contract for the printing and shipping of paper and plastic score sheets (132-33A, 160A). Because of Kock's lack of

finances and credit standing, the printer had declined to furnish score sheets to Kock other than on an essentially C.O.D. basis (133A).

The agreement with Brunswick provided that it was Kock's option to ship the score sheets to the Brunswick centers on an annual, semi-annual or quarterly basis (458A). As Kock was not in a position to store the score sheets, Brunswick agreed to accept them on this basis, even though, because of its commitment to Peabody, it did not have a present need therefor at all of its centers (435SM). Kock elected to ship semi-annually, and in late February and early March, 1973 shipped 2,400,000 paper score sheets and 30,000 plastic score sheets, leaving a balance due in September, 1973 of 2,100,000 paper score sheets and 30,000 plastic score sheets (458A).

On February 28, 1973, Walt Peabody Advertising Service, Inc. brought suit against Brunswick and Kock in California, alleging breach by Brunswick of Peabody's contract to supply score sheets (96A). Only Brunswick was served with process (95A).

The Peabody suit precipitated the determination of Brunswick's obligations to Peabody referred to in the November 27, 1972 contract. In a stipulation dated March 14, 1973, settling the action, Peabody and Brunswick set forth these termination dates on a center-by-center basis (Exhibit 27). The scheduled termination dates extended from March, 1973 through January, 1974 (the later dates reflecting Peabody's contractual commitments made immediately prior to Brunswick's notice of termination dated

November 27, 1972). Shortly after it ascertained the precise Peabody termination dates, Brunswick advised Kock thereof and stated that it would begin the use of the Kock sheets at various centers in accordance with these dates, in fulfillment of its legal obligations to Peabody (98-99A). Twenty-eight centers, representing centers at which the Peabody commitments had expired, or those at which Peabody had been unable to sell advertising, were available for the Kock sheets during March, 1973 (Exhibit 27). In accordance with the schedule, additional centers became available throughout the year.

At a meeting of the parties on March 26, 1973, Kock protested that this phasing-in would violate his understanding with his own advertisers. He requested an explanatory letter from Brunswick, which he could take to his advertisers. Brunswick accommodated him and gave him such a letter (66-67A, 99-100A), but Kock did not meet with his advertisers.

As of the trial, more than eighteen months subsequent to March, 1973, only one advertiser had complained, and that advertiser was the one which was not obligated to pay Kock for advertising (306A). None of the advertisers which had made payment complained or offered any word as to its satisfaction or dissatisfaction with the program (306A).

The record is barren of any testimony that, after the meeting with Brunswick on March 26, 1973, Kock contacted existing advertisers or pursued contacts with potential future advertisers. In fact, as his attorney conceded, Kock

kept a "very low profile" (222A). Kock made no attempt to ascertain whether advertisers would be satisfied with the equal number of exposures which compliance with the Peabody contracts would afford them, notwithstanding that such exposure was over a more extended period than March through September. The failure to actively pursue the score sheet program must be viewed in light of Kock's failure to sell the advertising space at rates which were high enough to pay for the printing of the first installment of score sheets. Apparently, realizing that the venture had failed from the start, Kock was ready to abandon it, and to attempt to profit therefrom, not by servicing Brunswick, but by suing it.

In September of 1973, Kock defaulted in his obligation of furnishing the additional 2,100,000 paper and 30,000 plastic score sheets. This default was never remedied. During all of the time in issue, Kock did not have the finances or credit sufficient to pay for printing and shipping this quantity of score sheets (160A), nor had he made any attempts to sell advertising.

At trial, no evidence was presented in support of Kock's ability to perform the balance of the contract. This issue is discussed in detail in Point I of this brief.

Kock asserted damages consisting of monetary expenditures incurred in connection with the contract, and the value of his time and effort expended in the preparation for and performance of the contract. No testimony was presented as to either the reasonableness or necessity of any item of asserted damage. The details of these ex-

penditures and the testimony relating thereto are discussed in Point II of this brief.

Kock received the sum of $39,760 from advertisers, all of which he retained and none of which he repaid, all without objection or claim on the part of the advertisers.

The Verdict

At the trial, the jury found for Kock in the amount of $79,464.78. The calculation of damages made by the jury is readily determinable, that is, $57,464.78 in reimbursement of Kock's alleged monetary expenditures and $22,000 for the time and effort expended by him in reliance on and in performance of the contract. No deduction was made for the sum of $39,760 from the damages so calculated.

ARGUMENT

POINT I

An essential item of proof needed to sustain the verdict is missing. Kock failed to prove he had the ability to perform the balance of his contractual obligations. No evidence was offered, and none exists, to establish Kock's ability to perform. In the absence of such proof, a jury verdict in favor of Kock is a manifest miscarriage of justice. The judgment should be reversed and the case dismissed or remanded for a new trial.

The performance required of Kock consisted of the delivery to Brunswick of 4,500,000 paper score sheets and 60,000 plastic score sheets, complying with the specifications of the agreement (458A). As was his right, Kock elected to perform in two approximately equal installments. His first shipment consisted of 2,400,000 paper score sheets and 30,000 plastic score sheets. After this initial shipment, there was due from Kock an additional 2,100,000 paper and 30,000 plastic score sheets.

To perform the balance of his obligations under the contract, Kock was required to finance the cost of printing and shipping the score sheets. His cost for printing and shipping the first installment of score sheets was $54,379.95 (318A).

As part of his burden of due performance, Kock had the burden of establishing by a preponderance of the evidence that he was ready, willing and able to perform the balance of the contract terms yet to be performed. While

a material breach by defendant may excuse actual tender of performance, nevertheless the defendant cannot be held liable for the payment of substantial damages, unless plaintiff has proved that he had the readiness, willingness and the ability to perform his part of the contract. As was stated by this Court in *Scholle* v. *Cuban Venezuelan Voting Trust,* 285 F. 2d 318, 320 (2d Cir. 1960), "The party wronged must show, however, that the breach caused his loss. To do this he must prove that he intended to and was able to perform when his performance was due."

In the context of this case, the term "ability" means financial ability to bear the cost of supplying the additional score sheets. Accordingly, it was Kock's obligation to prove that he would have had such ability to supply the large quantity of score sheets to be delivered in September of 1973. He wholly failed in his burden of showing such financial ability. In fact, the negative was shown. He testified that he had more than exhausted his own limited financial ability in supplying the first installment of score sheets and that he had no further source of credit or financing (160A). His only hope was a speculative one that, with respect to the second installment, he could have sold advertising to a sufficient number of advertisers, at high enough rates, to cover the cost of printing and shipping. Kock himself conceded that evidence with respect to prospective sales to potential advertisers was too speculative a matter to submit to the jury. In his Amended Requests to Charge (25A), he withdrew any claim for loss of prospective profits (which necessarily was based upon proof of prospective sales) and affirmatively conceded that the jury "may not award damages on any concept of

what the plaintiff would have made in profits from this venture, since our law as it now exists does not allow for recovery of such speculative damages'' (25A). Inherent in Kock's concession of the speculative nature of a claim for future profits is the fact that proof of Kock's ability to cover costs of the second installment is equally speculative. It is not enough to show expressions of general interest of advertisers, but rather a preponderance of the evidence must be presented which establishes that advertisers were ready to enter into contracts at rates which would have generated proceeds sufficient to cover the cost of printing and shipping. There was a total failure of such proof.

The Court below ruled that Kock had proved his ability to perform and declined to charge the jury that plaintiff had ''the burden of proving * * * that he had the ability to deliver the second installment of 30,000 plastic score sheets and 2,100,000 paper score sheets in September, 1973'' (29A, 400-01A). Thus, the issue of ability to perform was not even considered by the jury. We respectfully submit that the District Court Judge was in error in this view. As a result of this ruling by the Court below, Kock was rescued from a losing venture and actually permitted to profit therefrom, notwithstanding that had he been required to perform, he would have been unable to do so. The evidence showed that the venture, which had initially been presented in such glowing terms as being capable of attracting national names such as ''Mobil Oil'' and ''American Airlines'' (291-95A), found itself in deep trouble when it came time to perform. Instead of producing comfortable revenues from national brand advertisers, Kock found that

his efforts did not produce revenues sufficient to cover his cost of printing and shipping, much less those expenditures incurred in securing the advertising. Thus, of the eight advertising spaces on the score sheets, three were occupied by a promotional mail order company (294A). Revenue to Kock from these three spaces was wholly dependent upon problematical responses from persons desiring to order the merchandise. One advertiser (Chelsea Milling) obligated itself to pay only $1,000 (180A). The agreement with another advertiser (Baskin-Robbins) was extremely vague. Baskin-Robbins paid nothing at the time of the agreement and no understanding existed as to the amount it would ultimately pay (202A, 465A). Three other advertisers paid more substantial sums: $15,000 (N. W. Ayer); $12,200 (Carter Wallace); $11,562.50 (Rumrill-Hoyt) (180A); but in the aggregate the total proceeds of $39,760 did not even approach the cost of printing and shipping in the amount of $54,379.95 (318A), nor did these proceeds cover the alleged total cost of the venture in the amount of approximately $62,264.78.

As we have stated, it is the settled rule of law that proof of the ability to complete the performance of a contract, even after breach by the other party, is a requisite condition precedent to recovery in an action for its breach. *Scholle* v. *Cuban Venezuelan Voting Trust, supra; Strasbourger* v. *Leerburger,* 233 N.Y. 55, 60-61 (1922); *Ufitec, S.A.* v. *Trade Bank and Trust Company,* 21 App. Div. 2d 187, 190-191 (1st Dept. 1964), aff'd without opinion, 16 N.Y. 2d 698 (1965). We respectfully submit that the Court below was in error when it disregarded this rule.

Kock having wholly failed in his burden of proving this most significant element of his case, the action should be dismissed. When there is no evidence in the record from which a jury might find that Kock himself would not have been in breach of the contract, *i.e.*, that he had the ability to perform its essential terms, and indeed when the jury was not even permitted to consider this issue, then a verdict in Kock's favor is a classic case of miscarriage of justice. Further, when the evidence which was presented overwhelmingly demonstrates the lack of such ability to perform, a dismissal of the case, rather than a new trial, is mandated.

POINT II

Kock presented no competent proof of damage but nevertheless was awarded substantial damages. The award is excessive and requires a reversal of the judgment. Since no more than nominal damages were established, the action should be dismissed.

The jury was instructed that the measure of Kock's damages was the amount of money and the value of his time and effort expended from August 10, 1972 through May 2, 1973, in reasonable reliance, imminent expectation, and performance of the contract. Kock claimed total monetary expenditures of $62,264.78, from which the sum of $4,800, representing the cost of defective plastic score sheets, was deducted at the direction of the Court (409-10A), leaving a balance of $57,464.78. The verdict was $22,000 in excess of this sum, and it can therefore be readily determined that the jury awarded the sum of $22,000 as the value of Kock's time and effort.

The defects in the proof relating to damages were two-fold: (1) there was a total absence of testimony as to the reasonable value of any item of expenditure, and (2) in many instances there was no testimony relating the expenditure to the contract other than Kock's conclusory statements to that effect.

It is a settled rule of law that the reasonableness of expenditures for which a party seeks to recover cannot be assumed, and must be established by competent evidence. Mere evidence of an expenditure does not satisfy the burden of proof required of a plaintiff as to the reasonableness thereof. *Farrell* v. *Klapach*, 24 App. Div. 2d 590 (2d Dept. 1965); *Lichterman* v. *Barrett*, 157 N.Y.S. 882, 883-884 (App. T. 1st Dept. 1916); *Adair* v. *Young*, 205 N.Y.S. 2d 463, 465 (Sup. Ct. Schenectady Co. 1959). The requirement of proof as to the value received for money expended is well illustrated in those instances where Courts have reviewed claims for attorneys' fees, where it is uniformly held that an award of attorneys' fees may not be made without supporting proof. *Franklin National Bank* v. *Feldman*, 42 Misc. 2d 839, 842 (Sup. Ct. Nassau Co. 1964); see, *In re Freeman*, 34 N.Y. 2d 1 (1974); *Matter of Potts*, 213 App. Div. 59 (4th Dept.), aff'd 241 N.Y. 593 (1925); *Charman* v. *Tatum*, 54 App. Div. 61, 65-66 (2d Dept. 1900), aff'd without opinion 166 N.Y. 605 (1901).

The Printing Expenses

Kock's largest expenditure ($49,579.75)* was for printing and shipping. Notwithstanding that the printer, Richard L. Bersch, testified as plaintiff's witness (127A),

* After deduction of $4,800 for defective plastic score sheets.

there was not a scintilla of evidence as to reasonable value of the printing and shipping expenses. Presumably, plaintiff did not pursue this line of testimony with the printer because of the latter's lack of experience in printing score sheets (154A). Accordingly, Bersch's testimony was singularly limited to statements that he had quoted an estimate; that Kock had accepted the estimate; and that the bulk of the charges had been paid (129-35A). Bersch did not even offer his opinion that the cost was reasonable, and no one else was produced who was able to testify from his own experience that value was given for the sum of approximately $50,000 expended. Kock did not testify that he had any experience in the purchase of printing, and did not attempt to justify the reasonableness of the cost. The testimony as to cost is valueless for the purpose of serving as a basis for an award of damages, and the jury's award to the extent of $49,579.75 stands wholly unsupported.

Expenditure of Time and Effort

The jury award of $22,000 for the expenditure of Kock's time and effort during the approximately nine months which the Court considered to be the appropriate period (424A), was similarly improper. Not only was there no testimony specifying or itemizing the time expended or the nature of the effort, but, so too, was there a like absence of testimony setting forth any basis upon which the jury could value his efforts. The sole testimony which was offered, and which might bear on the value of Kock's time and efforts, was that prior to June, 1971, he had been employed in a far different occupation at an annual com-

pensation of $22,000 (37A). No testimony was offered as to how well those services were performed or even whether the termination of his employment was voluntary. There was simply no evidence before the Court and jury from which the value of Kock's time and effort could be measured and this award, as well, is completely without evidentiary support.

Miscellaneous Expenditures*

Kock cursorily testified to a number of miscellaneous monetary expenditures. He testified that he had expended aggregate sums in certain specific categories such as telephone answering service, trips, stationery and supplies, etc., but no effort was made to establish that the expenditure was in any way related to performance of or preparation for the contract.

The testimony as to expenses for telephone answering services is typical (205-06A). In summary, Kock testified that he had an answering service hooked up to the telephone at his residence address, which also served as his office, and that he had paid for this answering service an aggregate sum of $215.

Similarly, the testimony in support of the expenditure of $1,953.94 for telephone expenses was merely that he had a telephone at his home/office; that he used the telephone for his business; and that he had expended that sum of money (206A).

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* The amounts stated herein as Kock's expenditures are the corrected figures as testified to by him at 318A.

The testimony as to car rentals was likewise devoid of detail. In full, it was as follows:

> "Q. Could you tell us what you spent for car rentals for the period August 10, 1972 through May 2, 1973?
>
> A. $979 approximately.
>
> Q. Whom did you use for rental of cars, sir?
>
> A. I leased a car from Olin's Rent-a-Car.
>
> Q. I show you these cancelled checks and ask you if that represents payment of your car rentals?
>
> A. Yes, it does."

To substantiate an expenditure for travel in the aggregate sum of $958.74, Kock testified that he traveled to various potential advertisers, and that between August 10, 1972 and May 2, 1973 he had spent this sum (207-09A). Even in this instance, where some attempt to show a purpose was made, the linkage is very weak. No such attempt was made to support a $408 expenditure for photographers. Rather, Kock testified (209A), in explanation of this expenditure:

> "Q. Now, you engaged the services of various photographers, did you not, Mr. Kock?
>
> A. Yes."

He did make some attempt to substantiate the expenditure for entertainment in the amount of $695 by stating that he had entertained "[p]rospective advertisers, product managers, advertising agency people, and one or two of the people who lent me—investors who lent me money." This was the total testimony in support of this item of expenditure (209-10A).

He further testified that he expended $281 for postage (207A), $311.11 for stationery and supplies (210A), and $315.16 for gasoline, parking and tolls (211A). No substantiation of the reasons for these expenditures or designation of the purposes of the expenditures as they related to the contract was made.

Kock presented a claim in the sum of $2,750 for legal expenses paid on August 21, 1972, March 26, 1973, and March 27, 1973 (319-22A). The Court below, without stating its reasons therefor, refused to admit evidence of payment on March 27, 1973, although it did permit the other expenditures aggregating $1,750 (321-22A). The justification for legal expenditures was stated by Kock to be "* * * for your helping me with contracts and advertising for the bowling score sheet in terms of advertisers and Brunswick in the time period as specified by Brunswick" (320A). The Court will note a total absence of testimony to support the reasonableness of the expenditures for legal services in terms of value. All that was testified to was that a sum of $1,750 was expended. No expert testified that the sum was reasonable. No testimony was presented as to precisely what was done, that is, what documents were drawn, what advice was given and how much time was expended in the rendition of such services. The jury had utterly nothing before it on a basis of which it could determine that the expenditure of $1,750 was reasonable in amount and that Brunswick should be required to reimburse Kock for that specific amount.

Such was the testimony on the basis of which the jury awarded to Kock the sum of approximately $8,000 for

miscellaneous expenditures. We respectfully submit that there was not the slightest basis for any finding of monetary loss.

Summary

Kock's testimony is noteworthy not for its probative value but rather for the absence of evidentiary facts in support of the reasonableness of the expenditures and in certain cases, the necessity of the expenditures. In the absence of such proof, the Court should have stricken the testimony and the exhibits relating thereto (377-78A). In short, the jury had before it no competent proof of damage. Kock failed in his elementary burden of proving damages, and the award is not merely excessive, it is without any support whatever. Such a failure of proof as to damage does not merely merit reversal and a new trial but rather a dismissal in accordance with the oft-stated rule that an appellate court will not reverse and remand for a new trial to afford the opportunity of an award of nominal damages only. *Peyton* v. *Railway Express Agency, Inc.*, 158 F. 2d 671, 673 (5th Cir. 1946), *cert. den.* 330 U.S. 846 (1947).

POINT III

The Court below erroneously permitted Kock to recover twice, by not offsetting his receipts from his expenditures.

Kock received $39,760 from advertisers, no portion of which he refunded (428A). Neither in his pleadings nor at trial did he contend that he was entitled to retain these proceeds without crediting Brunswick therefor. Rather, Kock asserted, both in his pleadings (5-6A) and in his Amended Requests to Charge (26A), that he was entitled to a judgment of indemnification declaring that, if advertisers should seek recovery, Brunswick was required to indemnify him.

At trial, Kock presented no proof that any of the advertisers had requested a refund. No advertiser testified to dissatisfaction with the score sheet program; or claimed entitlement to a refund in whole or in part; or expressed an intention to secure a refund.

As the Court below correctly recognized, Kock's remedy was not in the area of indemnification. Rather he was required to present to the Court and jury all items of pecuniary loss, future as well as past, present as well as prospective, so that his damages would be determined in one action. *Park* v. *Hubbard,* 198 N.Y. 136, 139 (1910); *Gold Medal Farms, Inc.* v. *Rutland County Co-operative Creamery, Inc.,* 9 App. Div. 2d 473, 476 (3rd Dept. 1959), modified on other grounds, 10 App. Div. 2d 587 (1960). The issue of whether the jury was required to deduct Kock's proceeds from his expenditures in determining

damages is, in essence, the issue of whether in the future Kock would sustain damages in the form of reimbursement to advertisers. Kock presented not one shred of evidence to satisfy this burden of establishing all items of pecuniary loss.

Notwithstanding the total failure of proof on this issue of prospective damages, the Court below submitted the issue to the jury. The initial response of the District Court Judge had been that Kock, of his own volition, should reimburse advertisers out of any recovery (223A). Subsequently, he came to see that this was not the question before the court, but, rather, that the issue was whether there was sufficient proof in the record from which a jury could find, by a preponderance of the evidence, that there was a likelihood that Kock would be required to reimburse advertisers (406A). Nevertheless, it appears that the Court's initial thinking led it into the error of submitting the issue to the jury, over defendant's objections (407A), even though there was no proof whatever of a likelihood that Kock would be required to make a refund. To further compound the error, the jury was instructed (429-30A) that it could find for plaintiff on this issue if it determined that he was "under any *obligation* to make repayment, whether or not it has been demanded thus far * * *" (emphasis added). Thus, the jury could base an award on its view of "obligation" rather than a finding of the likelihood that plaintiff would be *required* to make payment.

We respectfully submit that on the basis of the evidence it was error to submit the question to the jury. The jury should have been charged that the sum of $39,760 was to

be deducted from any damages awarded. We further respectfully submit that the instructions under which it was submitted to the jury carried the error further.

As the judgment now stands, Kock has been reimbursed in full for all of his alleged expenditures, and as well, has been permitted to retain the entirety of the proceeds which he received from advertisers, thus permitting him a windfall double recovery with respect to the sum of $39,760. As previously stated, no advertiser was present in Court. Various documents (one purchase order and several letters) were introduced with Kock's testimony that they constituted the advertisers' commitments. These letters variously spoke of an intention "to implement a March through September 1973 schedule" (463A), an agreement for the period March 1973 through September 1973 (465A), a "commitment for your bowling score sheet program in the 200 Brunswick centers starting this March" (467A), "a participation in the program for the March-September period" (469A) and, in one instance, a commitment for January 1, 1973 for six months (455A). All payments from advertisers were received in the month of March 1973 (428A). The sole letter indicating dissatisfaction came from Baskin-Robbins, a non-paying advertiser (306A, 471A). As of the date of trial, nearly eighteen months after payment had been made and more than one year after the expiration of the March through September 1973 period, there had been no complaint from any advertiser who had paid for the advertising nor had there been any request for a refund of money (306A, 471A). Such was the totality of evidence relating to advertisers and their entitlement to refunds.

In the light of such a complete lack of evidence, it was the grossest of speculation on the part of the jury to, in effect, award the additional sum of $39,760 damages to Kock upon the grounds that there was a likelihood or obligation on his part to refund that sum of money to the advertisers. Furthermore, it was error for the Court to submit the question in terms of an "obligation" on the part of Kock to refund the monies to advertisers. While the Court charged the jury in the alternative as to "obligation" or "likelihood," its charge permitted the jury to award damages if it found a mere theoretical obligation on the part of Kock, notwithstanding that there may not have been any actual likelihood that the advertisers would bring an action for a refund (429-30A). To permit the jury to find on the basis of a theoretical obligation, was error.

The question before this Court is principally one of whether the jury had any evidence before it on the basis of which it could award damages to Kock equal to the amount of his proceeds from advertisers. We respectfully submit that the record is barren of any such proof. The amount awarded by the jury, based on this error is $39,760 (405A). Kock has been permitted to recover twice for this amount and, if the case is not otherwise dismissed, or remanded for a new trial, the Court should grant a remittitur in the amount of $39,760.

Conclusion

The judgment below should be reversed and the case dismissed or remanded for a new trial. No proof exists in the record to sustain a finding that Kock had the ability to perform the balance of his contractual obligations, or to sustain an award of damages.

In addition, it is clear that Kock has been compensated twice to the extent of $39,760, as a result of which, if the action is not dismissed or a new trial granted, an order of remittitur in this amount should be made.

Dated: New York, New York
January 27, 1975

Respectfully submitted,

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Service of 2 copies of the
within BRIEF is hereby
admitted this 27th day of
JAN. 1975

Signed Carolyn Burns for Brashich & Finl

Attorney for Plaintiff - Appellee

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